SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

Petition not printed

# No. 570

EDWARD A. HUNT AND ROBERT A. HUNT, CO-PARTNERS TRADING AS HUNT'S MOTOR FREIGHT AND FOOD PRODUCTS TRANSPORT,

*Petitioners,*

*vs.*

EDWARD CRUMBOCH, PRESIDENT, JOSEPH E. GRACE, SECRETARY-TREASURER, WILLIAM F. KELLEHER, INTERNATIONAL VICE-PRESIDENT, BUSINESS AGENT AND TRUSTEE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

## BRIEF OF PETITIONERS

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AND

EDWARD CRUMBOCH, WILLIAM F. KELLEHER, JOHN FISHER, JOSEPH BILLINGTON AND RAYMOND COHEN, INDIVIDUALLY

## BRIEF OF PETITIONERS

### Opinions Below

Opinions were written by both the District Court and the Court below. The opinion of the District Court (Kalod-

ner, J.), together with findings of fact and conclusions of law, appear in the Record at pages 42-50, and have been published in 47 Fed. Supp. 571.

The opinion of the Court below (the Circuit Court of Appeals for the Third Circuit, Maris, Goodrich and McLaughlin, JJ., appears in the Record at pages 51-54 and is published in 143 F. 2d 902.

## Jurisdiction

The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 938, U. S. C. Title 28, sec. 347).

The judgment of the United States Circuit Court of Appeals for the Third Circuit to be reviewed was entered on July 12, 1944 (R, 55). The said order affirmed the judgment of the District Court dismissing the complaint.

## Statement of the Case

This case involves the applicability of the Federal Anti-Trust Laws to a conspiracy, actuated by malice and vengeance, formed for the purpose of destroying an interstate commerce business (truck hauling in interstate commerce), and the successful attainment of the objective of the unlawful conspiracy—no labor disputes or labor objectives being involved.

The conspirators succeeded in destroying the business in the pursuit of the conspiracy.

## The Essential Facts

The petitioners were plaintiffs below, and will hereinafter be referred to invariably as "petitioners".

The respondents were defendants below, and will hereinafter invariably be referred to as "respondents".

The petitioners were copartners trading under the name of Hunt's Motor Freight and Food Products Transport,

with their principal place of business at Philadelphia Pennsylvania (R. 42). They were engaged in the business of transporting produce and food stuffs by motor truck for about fourteen years prior to February 4, 1939 (R. 42-43, 52), under an Interstate Commerce Commission permit (R. 21). From 80% to 85% of this transportation was interstate from and to Philadelphia (R. 43, 52). Practically all their work was done for the Great Atlantic & Pacific Tea Company (hereinafter called A & P) under written and oral contract with that company (R. 43, 52).

The respondents are a union and individual members and officers thereof. The trade union respondent is an unincorporated association of drivers and helpers engaged in "over the road hauling" (R. 43, 52)— "interstate carriers" (R. 34).

In 1937, the union called a strike of the truckers and haulers of the A & P in Philadelphia for the purpose of enforcing a closed shop (R. 43, 52). The plaintiffs (along with other contract haulers) attempted to operate during the strike, and in July of 1937 refused the offer of the union to negotiate (R. 43, 52), as did the others (R. 39). The strike ended in August, 1937 (R. 31, 32).

On September 4, 1937, one of the men connected with the union (Hass) was shot and killed at or near the union headquarters (R. 43, 52). Edward A. Hunt, one of the petitioners, was tried in the Philadelphia Courts for the killing and was acquitted (R. 43, 52).

The union and its members, however, always connected Hunt with the killing (R. 36); and (actuated by resentment and hatred and out of motives of revenge) conspired together to destroy the business of the petitioners (R. 26, 33, 35, 36, 37, 38, 39, 40, 41, 42, 44.)

On December 13, 1938, A. & P. entered into a closed shop agreement with the union whereby the A & P recognized the union as the bargaining unit for its employees, as a

result of which the various contract haulers, who together with the petitioners did the hauling for A & P, also recognized the union as the bargaining agent for their employees (R. 43, 52).

In consequence, employees of all A & P's various contract haulers were notified that they were required to become members of the union (R. 44, 52). At the time of the making of the closed shop agreement, A. & P. had been employing the services of some 25 haulers (including petitioners) who were using about 48 trucks. The petitioners had eight trucks (R. 44, 52), and were one of the two largest haulers for A & P (R. 32).

All the haulers of A & P (except petitioners) made closed shop agreements with the union (R. 44, 52). All employees of the contract haulers, other than the petitioners, were accepted into the union (R. 39).

The petitioners attempted to make similar agreements with the union, and their employees attempted to join the union (R. 44, 54).

The union, however, in pursuance of its conspiracy, refused and still refuses to negotiate with the petitioners; and refused to admit any of the petitioners' employees into the union as long as they remained employees of the petitioners (R. 44, 53).

Only in exceptional cases would it be possible for a non-union man operating a truck in the Philadelphia area to load or unload merchandise at a warehouse in Philadelphia, because of the union situation and the organization of the warehouse firms (R. 34, 35).

The respondents consistently refused to permit any of its union members to work for the petitioners after February 1, 1939 (R. 41).

Further, the respondents forced A & P first to breach, and then to cancel, its hauling contract with the petitioners. The then asserted grounds for the compulsion were:

(a) Hunt's drivers were non union: R. 44 (the union had refused membership to the drivers with just this in view: R. 23);

(b) Hunt had not "signed up" with the union (but the union had consistenly rejected all Hunt's attempts to sign up (R. 28, 29);

(c) The union had made the elimination of Hunt a condition precedent to the making of the contract of December 1938 with A & P (R. 40, 28, 29).

Petitioners' services had always been satisfactory to A & P (R. 44, 53).

Petitioners thereafter secured a written contract for interstate hauling with Sterling Supply Co. of Philadelphia, but the respondents, still pursuing the unlawful conspiracy and still pursuing the petitioners, forced Sterling to take its work away from the petitioners (R. 44, 53) by threats of trouble (R. 26).

A & P's forced cancellation of the hauling contract with petitioners interfered with its ability to handle its goods in inferstate commerce: It affected A & P to the extent that it had to replace seven trucks (R. 30-31).

As a consequence of their acts, the respondents succeeded in destroying the business of the petitioners (R. 44, 53).

Petitioners' suit for treble damages and injunctive relief under the provision of the Sherman Anti-Trust Act, as amended by the Clayton Act, followed.

At the trial before Kalodner, J., in the District Court, after the presentation of all petitioners' proofs except those relating to the measure of damages, the trial judge granted respondents' motion to dismiss the complaint (R. 50). Upon

appeal, the Circuit Court of Appeals for the Third Circuit affirmed (R. 55).

### Features of Opinions Below

The trial judge in his opinion relied heavily upon the Apex case.[1]

For his conclusion that the respondents had not violated the Sherman Act, he said in the course of his opinion (R. 47):

> "Applying the principles enunciated in the Apex Hosiery Co. case, I cannot see how the plaintiffs meet them. Assuming that there was a restraint on interstate commerce, the conduct of the defendants is not 'shown to have or is intended to have an effect upon prices in the market or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition.'
>
> Indeed, whatever evidence exists is quite to the contrary—the operations of A & P and the Sterling Supply Company were not affected by the elimination of the plaintiffs and there was no evidence that the public was in any way affected."

(In the course of the brief, it will be argued that:

(a) the operations of A & P and the Sterling Supply Co. *were* affected by the elimination of the petitioners, and

(b) that the public *was* affected.)

Further, the trial judge in his opinion rejected the attempt of the petitioners to distinguish the conclusion reached in the *Apex* case, upon the ground that it involved labor objectives and the pursuit of labor objectives, while in the instant case a labor dispute was not involved and labor objectives were not being sought (R. 48); and rejected also the petitioners' contention that the interference with interstate commerce in the case at bar was direct and fundamental, as distinguished from incidental (R. 49).

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[1] *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 60 S. Ct. 589, 84 L. 1311.

The opinion conceded that "In the instant case there is no doubt that the plaintiffs (respondents) have suffered a private injury" (R. 49).

The only case cited in the opinion of the court below was the *Apex* case. It adopted the finding of the District Court (which petitioners contend strongly was unsupported by and contrary to the evidence) that the interstate business of the A & P and Sterling Supply Co. was not affected by the elimination of the petitioners' services: "* * * In other words, that the two companies continued to transport the same quantity of produce, foodstuffs and other products in interstate commerce as they would have done had they renewed their hauling contracts with the plaintiffs, * * *" (R. 53).

The court below concluded that the planned destruction of the petitioners' business and their elimination from the interstate hauling field was not such a restraint upon the interstate commerce as to be cognizable under the Sherman and Clayton Acts (R. 53), because Congress in those statutes sought to prevent "only those restraints upon free competition in business or commercial transactions which tend to restrict production, raise prices or otherwise control the market in goods or services to the detriment of the public". (R. 53-54).

Finally, the court below stated (R. 54):

> "We must assume, for nothing to the contrary appears in the plaintiffs' case, that the number of haulers available to haul produce and foodstuffs was not diminished but simply that some other hauling concern took over the work formerly performed by the plaintiffs and that there was no increase in the cost of hauling traceable to the acts of the defendants in eliminating the plainiffs from the field."

## Assignments of Error

The Circuit Court of Appeals for the Third Circuit erred

1. In affirming the judgment of the District Court dismissing the complaint.

2. In holding that the destruction of an interstate commerce business, *an instrumentality of interstate commerce,* brought about by a malicious conspiracy intended to have that effect, in which the conspirators were actuated by motives of hatred and revenge, and which was unconnected with any labor dispute or the attainment of a labor objective, is not actionable under the anti-trust laws.

3. In failing to distinguish between cases where the restraint upon interstate commerce is direct and primary and, therefore, actionable, and cases where the restraint is indirect, incidental and secondary, and therefore not actionable.

4. In holding that such a destruction of an interstate commerce business does not deprive purchasers or consumers of the advantages which they derive from free competition.

5. In holding that the combination's planned destruction of such an interstate commerce business, with the consequent deprivation of a trader's liberty freely to engage in his calling, was not a violation of the anti-trust laws.

## Specification of Such of the Assigned Errors as Are Intended to Be Urged

The petitioners intend to urge all of the assigned errors.

## Summary of Argument

1. Viewed in the light of the anti-trust laws, the business of the petitioners was more than merely a business

in interstate commerce: *it was an instrumentality itself* of interstate commerce.

2. This court has held specifically that the planned destruction by a combination of a business in interstate commerce is a violation of the anti-trust laws. This court *a fortiori* has held that the planned destruction by a combination of an *instrumentality* of interstate commerce is a violation of the anti-trust laws.

When an instrumentality or an interstate business is thus destroyed by an unlawful combination, the restraint upon interstate commerce follows as a necessary corollary.

The elimination of an interstate hauler from the field establishes a restraint upon interstate commerce within the meaning of the anti-trust laws, in that it

(a) *pro tanto* deprives the public of the competition created by the presence of the hauler in the field; and

(b) deprives a trader of his liberty freely to engage in a calling in interstate commerce.

It is established that direct and primary restraints are violations of the anti-trust laws, and that the planned destruction of an interstate business or intsrumentality is such a direct and primary restraint.

The decision in the *Apex* case does not control the disposition of the case at bar, nor does it adversely affect the petitioners' claim for relief under the Sherman and Clayton Acts.

The *Apex* case (considered only in conjunction with the present case) stands but for the proposition that the incidental restraint upon interstate commerce flowing from the activites of a union involved in a local strike in pursuit of legitimate labor objectives is not (unless the restraint be directed at control of the market, or so wide-

spread as substantially to affect it) cognizable under the anti-trust laws.

The implications of the language in the *Apex* case, (that certain restraints do not amount to violations of the Sherman Act if they fall short both in purpose and effect of any form of market control of a commodity such as to monopolize the supply, control its price, or discriminate between its would be purchasers) are applicable only to the facts of the *Apex* case (i. e., the case of a local strike by a union pursuing legitimate labor objectives, with only an incidental consequent restraint upon interstate commerce).

A factor in the rationale of the *Apex* Case, it is to be inferred, was the weighing of the relative advantages and disadvantages between two courses:

(1) A rigorous application of the Sherman Law, such as might outlaw many strikes;

(2) A partial limitation of the scope of the law, designed to preserve to unions their right to engage in local strikes, undeterred by the risk of being held to have violated the Act by the consequent incidental restraint upon interstate commerce.

In the case at bar, no labor dispute was involved, and the union sought no labor objective, but was acting and conspiring solely through malice.

**Text of Relevant Sections of Sherman and Clayton Acts**

The Act of Congress of July 2, 1890 (15 U. S. C. A. Sec. 1 et seq.), known as the Sherman Act, provides inter alia:

> "Section 1. Every contract, combination in the form of trust or otherwise or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. * * *"
>
> "Section 7. Any person who shall be injured in his business or property by any other person or corpora-

tion by reason of anything forbiden or declared to be unlawful by this act, may sue therefor in any circuit (district) court of the United States in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fees."

The Act of Congress of October 15, 1914 (15 U. S. C. A. Sec. 12), known as the Clayton Act, provides, inter alia:

"Sec. 1. Be it enacted * * * That 'anti-trust laws,' as used herein, includes the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' approved July second, eighteen hundred and ninety; * * *"

"Sec. 4. That any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

## ARGUMENT

### General Considerations

I. Judicial construction of the Anti-trust Laws has defined and fixed their nature, their objectives, and the concept and philosophy which underlie, color and inform them: and more, has pointed out specifically certain classes or categories of cases which come within both the letter and spirit of those laws.

The Court below, in affirming the dismissal of the complaint (filed under the Anti-Trust laws) has departed from

those concepts, from that philosophy, and from this Court's construction of those laws; and has excluded from their operation and coverage specific categories which this Court has hitherto included.

II. Among or constituting the great objects of the laws, are (1) the inhibition of restraints upon interstate commerce; (2) the prohibition of monopolies; and (3) preservation of the right of freedom to trade.[1]

Among the specific categories hitherto adjudged to be violations are (1) destruction of *an instrumentality itself* of interstate commerce (2) destruction of an interstate commerce business (i. e. destruction, instead of preservation, of a trader's right to engage in interstate business).[2]

The court below has (1) by its order refused to enjoin such a restraint upon interstate commerce; and (2) by its reasoning encouraged, instead of stemming a tendency towards monopoly in the interstate field.

And the court below has refused to restrain, or permit the awarding of damages for, that which constituted both the destruction of an instrumentality itself of interstate commerce, and of a business in interstate commerce: refused to restrain an obstruction to the right to offer services to the public.

That which the respondents conspired, out of motives of malice, hatred and revenge, to destroy (and effectively destroyed) was a pure instrumentality of interstate commerce—a truck hauling business over state lines.

The Court below said:

> "We must assume, for nothing to the contrary appears in the plaintiffs' case, that the number of haulers available to haul produce and foodstuffs was not diminished but simply that some other hauling con-

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[1] *U. S.* v. *Colgate*, 250 U. S. 300, 307; 39 S. Ct. 465, 468.

[2] *U. S.* v. *Colgate*, *supra*.

cern took over the work formerly performed by the plaintiffs and that there was no increase in the cost of hauling traceable to the acts of the defendants in eliminating the plaintiffs from the field. It is in the public interest that the supply of commodities and services be undiminished and the cost not increased. From the standpoint of the public, however, it is immaterial whether the plaintiffs or others provide the services" (R. 54).

In so saying, that court placed the stamp of its approval upon a practice which eliminates a competitor from a particular field in commerce, upon the ground that there are plenty of others left to handle the business and to take over the work performed by the ousted competitor. Extend this principle, and competitors may with impunity be removed from the field one by one, and the business swallowed up by the single remaining giant which has conspired with others to destroy them, and which remains to dominate the field. This is, in fact, the exquisite formula for monopoly.

III. The Court below, in its conception and application of the *Apex* case[2a], has cut a segment out of the sphere of the Anti-Trust Laws. It has attempted to carve out of their orbit all restraints except those "which tend to restrict production, raise prices or otherwise control the market in goods or services to the detriment of the public"—*refusing to interpret the "control the market in * * * services" phrase as including the plotted elimination from the market of an instrumentality of interstate commerce.*

IV. It was inevitable that, immediately following the enactment of the Sherman Law, the Courts should have embarked upon that judicial course of construction (influenced by the economic fundaments of the Act and limited

[2a] *Apex Hosiery Co.* v. *Leader, et al.*, 310 U. S. 469; 60 S. Ct. 982.

by the logical bounds set by its language), which is known by the familiar term "process of inclusion and exclusion". This is the normal procedure by which the judiciary implements the work of the legislature in enactments of broad national scope, giving life to the cold words of the statute, and animating by the joint exercise of the functions of the two branches, the national policy which found expression in the enactment.

This process by gradual steps dispels the obscurity which may at first enshroud such statutes, and finally fixes a boundary line, upon either side of which fall cases within or without the operation of the law.

Two marked tendencies thus gradually emerged in the operation of this process upon the Anti-Trust Laws:

(a) *Instrumentalities* themselves of commerce (i. e. transportation business and facilities) became one of the subjects most jealousy guarded from the imposition of the restraint inhibited by the Act;

(b) That restraint upon commerce (if not too widespread or far-reaching in its effect) which almost inevitably flowed from local labor disputes arising from the pursuit of legitimate labor objectives, were declared to be without the orbit of the Anti-Trust Laws.

The first tendency found perhaps its most forcible expression in the Williams[2b] and Anderson[2c] cases; the second tendency finds its expression in the Apex[3] case.

## The Business of the Petitioners Was An Instrumentality of Commerce

The business carried on by the petitioners was interstate truck hauling. So the District Court found, so the court

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[2b] *Williams et al.* v. *United States*, 295 F. 302 (CCA-5) (1923).

[2c] *Anderson* v. *Shipowners Ass'n of the Pacific Coast et al.*, 272 U. S. 359; 47 S. Ct. 125; 71 L. Ed. 298.

[3] *Apex Hosiery Co.* v. *Leader, et al.*, *supra.*

below stated, and so the facts established. The petitioners hauled commodities over state lines under a permit granted by the Interstate Commerce Commission. They were engaged in the business of transportation. Transportation is commerce itself.

> "Commerce undoubtedly is traffic * * * Conversely, traffic is commerce." Gibbons *v.* Ogden, 22 U. S. 1; 9 Wheat 1; 6 L. Ed. 23.

In *U. S.* v. *Trans-Missouri Freight Ass'n,* 166 U. S. 290, 312; 17 S. Ct. 540, 548; 41 L. Ed. 1007, 1018, it was stated:

> "Railroad companies are instruments of commerce and their business is commerce itself."

It would seem unnecessary to work out a demonstration that the suppression of an instrumentality itself of commerce makes out an *a fortiori* case for the application of the provisions of the Sherman Act, as compared with the supression of a business which merely receives or ships goods across the state lines. Both suppressions indeed restrain commerce, but from the inherent nature of things nothing can be a more direct and primary restraint upon commerce than the suppression or destruction of an instrumentality thereof. Such an instrumentality does not merely bear a relation to commerce; it is not merely engaged in interstate commerce; it is the commerce itself. It is patent that commerce could not exist without the operation of its instrumentalities.

### The Cases Involving Instrumentalities

The courts have been quick to strike down combinations or conspiracies which affect instrumentalities of commerce, and to declare them restraints within the meaning of the anti-trust laws.

Note: In the following pages, all italics are supplied unless otherwise indicated.

In *Anderson* v. *The Shipowners Ass'n, supra*, this Court declared illegal, as a combination, in violation of the Anti-Trust Act, an association of shipowners or operators, as well as the agreement reached by the members of the association, by virtue of which they controlled the employment of seamen upon vessels engaged in commerce. Emphasizing the circumstance that the vessels were instrumentalities of commerce, this court said (p. 363):

> "If the restraint thus imposed had related to the carriage of goods in interstate and foreign commerce—that is to say, if each ship owner had precluded himself from making any contract of transportation directly with the shipper and had put himself under an obligation to refuse to carry for any person without the previous approval of the associations—the unlawful restraint would be clear. *But ships and those who operate them are instrumentalities of commerce and within the commerce clause no less than cargoes.*"

And again at page 364:

> "Here, however, the combination and the acts complained of did not spend their intended and direct force upon a local situation. On the contrary, they related to the employment of seamen for service on ships, both of them instrumentalities of, and intended to be used in, interstate and foreign commerce; and the immediate force of the combination, both in purpose and execution, was directed toward affecting such commerce. *The interference with commerce, therefore, was direct and primary, and not, as in the cases cited, incidental, indirect and secondary.*"

The "cases cited," referred to in the above excerpt, related to "local matters"—building in San Francisco, manufacturing and mining operations.[4] In thus pointing out

[4] *Industrial Assn.* v. *U. S.*, 268 U. S. 64, 45 S. Ct. 403, 69 L. Ed. 849; *United Leather Workers I. U.* v. *Herkert and Meisel Trunk Co.*, 265 U. S. 457, 44 S. Ct. 623, 68 L. Ed. 1104; *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 354, 42 S. Ct. 570, 66 L. Ed. 975.

the difference between such cases and the Shipowners case, the court emphasized the distinction between indirect and direct restraints, holding that *where an instrumentality of commerce was involved, the restraint was direct and primary.*

In the Trans-Missouri case,[5] where this court enjoined the combination of an association of common carriers (railroads) which combined to maintain freight rates, the defendants contended that the Anti-Trust Act did not apply to or cover common carriers by railroad, and that the statute was not really intended to reach that kind of an agreement, relating only to freight rates, entered into by competing railroad common carriers; but was intended to reach only those who were engaged in the manufacture or sale of articles of commerce and who, by means of trusts, combinations and conspiracies, were engaged affecting the supply or the price or the place of manufacture of such articles.

This Court rejected the contention, saying:

> "The terms of the act do not bear out such construction. Railroad companies are instruments of commerce *and their business is commerce itself.*"

In *Williams* v. *United States*, 295 F. 302, (C. C. A. 5) (1923)[4] the Circuit Court affirmed a judgment of conviction under an indictment charging violation of the Anti-Trust Act. There, strikers had agreed upon a plan to obtain employment with the Southern Pacific Railway companies under assumed names and concealed identities, and while so employed, to disable engines of the railway company by putting quicksilver in engine boilers (which would cause the flues to leak).

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[5] *U. S.* v. *Trans-Missouri Freight Assn*, 166 U. S. 290, 17 S. Ct. 540, 41 L. Ed. 1007, 1018.

The court said (p. 304):

> "Undisputed evidence showed that the Southern Pacific Railway Company was engaged in interstate commerce by railroad. *Engines are indispensable to such commerce*". Pederson v. D. L. & W. R. Co., 229 U. S. 146-151, 33 S. Ct. 648, 57 L. Ed. 1125, Anno. Cases 1914 C 153. Evidence adduced supported a finding that a necessary effect of the successful execution of the plan agreed on would be directly to restrain commerce among the several states by disabling indispensable *instrumentalities* of such commerce."

(Such a finding hardly required evidence to support it.) The Court went on to say (page 305):

> "Restraint of interstate commerce is a necessary effect of executing a contract or agreement to disable, not engines which may or may not be used or designed to be used in interstate commerce, but engines generally of an interstate carrier by railroad. * * * The fact that the execution of the conspiracy now in question would have the necessary effect of *directly*, materially, and substantially restraining interstate commerce by disabling indispensable *instrumentalities* of such commerce, clearly distinguishes that conspiracy from the agreement or plot in regard to coal mines which was in question in the case of United Mine Workers v. Coronado Coal Company, 259 U. S. 354, 42 S. Ct. 570, 66 L. Ed. 975."

Little analysis of the above authorities is required. They demonstrate that the Courts have not hesitated to strike down, as violations of the Sherman Law, conspiracies affecting instrumentalities of commerce, and to characterize the resultant restraints as direct and primary. Search has failed to reveal any contrary adjudication in this court. Indeed, it would be strange to find such a contrary decision, especially since, as will be shown in the next division of this argument, this Court has struck down similar conspi-

racies directed, not at an instrumentality of commerce, but merely against a business engaged in interstate commerce.

Appropriate language on the subject is found in Teller on Labor Disputes and Collective Bargaining (1940) Sec. 50, page 133:

> "* * * With respect to the instrumentalities of interstate commerce, such as railroads, it is the law that no intent needs to be shown to restrain interstate commerce. The mere activity upon the instrumentality which moves in interstate commerce, if unlawful, is held to constitute an obstruction."

The analogy, or perhaps it would be more accurate to say the identity, between railroad and ship instrumentalities on one hand, and a motor truck instrumentality on the other hand is plain: and is further borne out by the Motor Carrier Act of 1935 (49 Stat. 543) as amended to Part II of Interstate Commerce Act (54 Stat. 919), by virtue of which trucks, so far as interstate commerce is concerned, are now by legislative mandate placed in the same category as railroads.

Inevitable too is the conclusion that the case *sub judice* presents a stronger case for the application of the provisions of the Sherman law than any of the cases cited, for in none of them was the instrumentality involved completely suppressed, destroyed and eliminated from the field, as is the case here.

**Cases Involving Businesses Other Than Instrumentalities**

Even the planned conspiratorial destruction of a business which merely engages in interstate commerce, although not an instrumentality thereof, is a violation of the anti-trust act.

In the same category as a conspiracy to destroy a business is a conspiracy to prevent one from carrying on such a business.

This Court so held specifically in *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 44 S. Ct. 96, 68 L. Ed. 308, a case bearing a striking resemblance on the facts to the instant case.

In the *Binderup* case, an exhibitor who owned a moving picture theatre in Nebraska and operated theatres elsewhere as lessee, and was also in the business of selecting and distributing films and advertising matter to a circuit of moving picture theatres in the same state, filed a complaint under the anti-trust act against distributors located in the State of New York, who were there engaged in manufacturing motion picture films and distributing them throughout the United States.

This Court said (p. 311):

> "* * * The allegation of the complaint is that the exhibitor had been procuring films from some of the distributors but had refused to buy from others, who thereupon induced the former to cease dealing with him, and that all then combined and conspired, in restraint of interstate trade and commerce, to prevent him from carrying on his said business; that they have ever since refused to furnish him with film service and have caused unexpired contracts which he held with some of them to be illegally cancelled. *It is difficult to imagine how interstate trade could be more effectively restrained than by suppressing it* and that, in effect, so far as the exhibitor is concerned, is what the distributors in combination are charged with doing and intending to do. It is doubtless true that each of the distributors, acting separately, could have refused to furnish films to the exhibitor without becoming amenable to the provisions of the act, but here it is alleged that they combined and conspired together to prevent him from leasing from any of them. The *illegality* consists, not in the separate action of each, *but in the conspiracy and combination of all* to prevent any of them from dealing with the exhibitor. * * * The contracts with these distributors contemplated and provided for transac-

> tions in interstate commerce. The business which was done under them—leasing, transportation and delivery of films—was interstate commerce. The alleged purpose and direct effect of the combination and conspiracy was to put an end to these contracts and future business of the same character and 'restrict, in that regard, the liberty of a trader to engage in business' Loewe vs. Lawlor, 208 U. S. 274, 293, and, as a necessary corollary, to restrain interstate trade and commerce, in violation of the Anti-Trust Act."

It would only labor the point to demonstrate how parallel are the facts in the *Binderup* case to those in the instant case. What the distributors did in the *Binderup* case, the respondents did in the case here. This Court, in the *Binderup* case, repudiated many of the defenses raised by the respondents in the instant case, among them the respondents' contention that each component act of their conspiracy was lawful in itself.

If the conspiracy which put an end to Binderup's interstate business was a violation of the Sherman Act, then the conspiracy which put an end to the instrumentality of commerce operated by the petitioners here is all the more patently in violation of the act, and entitles the petitioners to the relief sought.

The *Mitchell Woodbury* case:[6]

In this case a combination of corporations engaged in the same business as the plaintiff had conspired with individuals to deprive the plaintiff of its interstate business and to destroy that business (through the medium of obtaining lists of customers, etc. from former employees of the plaintiff): and had committed other acts to prevent plaintiff from acquiring new business.

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[6] *Mitchell Woodbury Corp. v. Albert Pick Barth Co., Inc., et al.*, 57 F. 2d 96 (Cert. den. 286 U. S. 552, 52 S. Ct. 503).

The defense was that if any wrong had been committed, it was a private wrong constituting no offense under the anti-trust acts.

The Court said:

> "Here the alleged intent of a conspiracy between the defendants was to destroy the competition of the plaintiff and deprive it of its interstate business. If proven as alleged, it was an unlawful purpose, an undue interference with interstate commerce, and to that extent is injurious to the public interest which is entitled to the free and full flow of interstate trade, subject only to such effect as natural and reasonable competition may have upon it." (41 F. 2d 148, 151.)

Quoting from *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238, 38 S. Ct. 242, 244, 62 L. Ed. 683, the court said:

> "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition, *or whether it is such as may suppress or even destroy competition.*" (Italics by the court.)

It is not to be presumed that to bring such a case of suppression or destruction of competition within the purview of the anti-trust law, it is necessary to show that it was a competitor who suppressed or destroyed the competition. The Sherman Act condemns *any* combination or conspiracy which commits such an act. No competitor was involved in the *Binderup* case, or in the *Williams* case, or in the *Shipowners* case.

The two cases just examined—the *Binderup* case and the *Albert Pick Barth* case—demonstrate that the planned suppression or destruction of an interstate business, or its elimination from the field, (less striking than that of an instrumentality of commerce) is a violation of the Sherman

law, and lends force to the petitioners' contention that the respondents have violated the anti-trust laws in destroying the business of the petitioners, and in eliminating them from the field of competitors in interstate commerce.

**The Right to Engage in Any Lawful Calling**

This is a right preserved by the Sherman Act. Any undue restraint thereupon is a violation of the Act. The right is correlated with the right of the public to receive goods and services as freely as it would without such restraints.

This is the specific pronouncement of the Court in *U. S. v. The American Medical Assn. et al.*, 110 F. 2d 703 (affirmed by this Court in *American Medical Assn. v. U. S.*, 317 U. S. 519, 63 S. Ct. 326, 87 L. Ed. 434).

The Court of Appeals there said:

> "Restraints prohibited by Sec. 3 of the Sherman Act are those which unduly hinder a person from employing his talents, industry, or capital in any lawful undertaking and thus keep the public from receiving goods and services as freely as it would without such restraints. * * * (p. 712).
>
> "* * * It certainly cannot be doubted that Congress intended to exert its full power, in the public interest, to set free from unreasonable obstruction the exercise of those rights and privileges which are a part of our constitutional inheritance, and these include immunity from compulsory work at the will of another, the right to choose an occupation, the right to engage in any lawful calling for which one has the requisite capacity, skill, material, or capital, and thereafter the free enjoyment of the fruits of one's labors. Congress undoubtedly legislated on the common law principle that every person has individually, and that the public has collectively, a right to require the course of all legitimate occupations (in the District of Columbia) to be free from unreason-

> able obstructions; and likewise in recognition of the fact that all trades, businesses and professions, which prevent idleness and exercise men in labor and employment for the benefit of themselves and their families and for the increase of their substance, are desirable in the public good and any undue restraint upon them is wrong and is immediate and unreasonable and, therefore, within the purview of the Sherman Act." (p. 713)

In affirming, this Court said (317 U. S. 529):

> "Whether the conspiracy was aimed at restraining or destroying competition, or had as its purpose a restraint of the free availability of medical or hospital services in the market, the Apex case places it within the scope of the statute."

The principle adds the sanction of time to its more recent application. In 1907, this Court stated in *Loewe* v. *Lawlor*, 208 U. S. 274, 293; 28 S. Ct. 301, 303; 52 L. Ed. 488, 496:

> "* * * the Act prohibits any combination whatever to secure action which essentially obstructs the free flow of commerce between the states, or restricts, in that regard, the liberty of a trader to engage in business."

The authorities cited clearly establish that violations of the Anti-Trust Laws embrace conspiracies for (a) a destruction of an instrumentality of commerce; (b) a destruction of a business in interstate commerce; (c) the restraint of a trader's liberty freely to engage in a calling in interstate commerce.

It is equally clear that the acts of the respondents fall within all three categories. They conspired to and did destroy the interstate hauling business of the petitioners—an instrumentality in interstate commerce; and by the same

token they planned to and did destroy a business in interstate commerce, and undoubtedly, the right of the petitioners to engage in their lawful calling (transportation of commodities) in interstate commerce.

Upon the said counts, therefore, the respondents have violated the anti-trust laws.

**The Conspiracy and Its Objective**

It may be well at this point to make some observations concerning the conspiracy and its objects.

After the Haas killing Crumboch, "boss" of the union, "in charge of the organization", and the person who carried out the policies fixed by the Executive Committee of the union, the International Vice President of the teamsters of the entire county (United States and Canada) (R. 33) decided that Hunt was "out" (R. 36). This was decided when "he (Hunt) killed my man" (R. 36).

Hunt's name appeared on a list of names, and opposite the name "Hunt" was written the word "out". This word was written in by either Murphy or Cohen (Trustees and Business Agents of the union, respectively) at Crumboch's order (R. 35).

All through the testimony runs the incontestable inference that respondents had conceived a deliberate plan to destroy the petitioners' business, and had set out effectively to execute the plan. But the conclusion is not left to inference. The refusal of membership in the union to the employees of the Hunts, as long as they remained in that employ, was a step deliberately calculated to bring about the destruction of that business. Hunt appealed to Ray Cohen concerning this non-admission of his employees into the union, and said:

> "What are we going to do? If we can't get our men in the union, we will go out of business?"

Ray Cohen answered:

> "Well, you are wising up to yourself. *That is what we intend to do.* (R. 22) * * * That is what we intended to do all along, put you out of business." (R. 23)

Ray Cohen told Francis M. Shaw (an employee of the Hunts) that the refusal to admit the employees of the Hunts into the union was both his opinion and that of the Executive Board (R. 25).

Fitting into the pattern of the scheme, respondents prohibited union members from working for the Hunts (R. 41).

The plan of respondents was nothing less than the elimination of the Hunts as interstate haulers, and was expressed by Crumboch during the negotiations with A. & P. in December of 1938. The testimony follows:

> "Q. Mr. Crumboch, when was the first time you notified anyone representing the A. & P. during the negotiations that Hunt would have to be eliminated, that Hunt would not be accepted in the union or you would not give a contract?
>
> "A. I guess it would be the first time I ever sat down with him. I don't know when that would be.
>
> "Q. Was that as early as the fall of 1938?
>
> "A. I imagine in December, when I negotiated in Mr. Gray's office with Mr. Shimmat, from Chicago.
>
> "Q. December, 1938?
>
> "A. I think it was December, 1938.
>
> "Q. At that time you notified Shimmat you would not negotiate with Hunt?
>
> "A. Whatever the date was.

The respondents were "definitely" after Hunt (R. 41).

The respondents knew perfectly well that the Hunts could not operate unless their employees were admitted into the union (R. 34, 35).

Refusal to admit petitioners' employees to the union, or to let union members work for Hunt, was but one step

in the conspiratorial scheme. It was followed by the next logical step—forcing the Hunts out of business by compelling those for whom they hauled to discontinue their services.

The conspirators pursued the Hunts relentlessly. First they forced A. & P. to take away its business from the Hunts. (This was all of Hunt's business.) When the latter secured a hauling contract with Sterling Supply Company, the respondents, still on the trail, followed the Hunts there and compelled Sterling by threats of trouble to eliminate them. The end was inevitable and the Hunts were doomed. They could get no contracts—or could not keep them—and their business and assets were destroyed. The trial judge said in his opinion: "There is no doubt that the plaintiffs (petitioners) have suffered a private injury" (R. 49).

Here, then, briefly sketched, is a classic picture of the sort of conspiracy outlawed by the Anti-Trust Acts.

Of and in itself, without reference to the Sherman Law, the concerted action constituting the conspiracy was unlawful because it was actuated by malice. It had for its attained objective nothing less than the destruction of an instrumentality in interstate commerce and the elimination of that competitive instrumentality from the field.

Important to note is that no labor objective was sought or involved in the entire case. No dispute existed concerning wages, or hours, or conditions of labor, or admission into a union. Indeed, here was a paradoxical situation where the union and its officers and members, avid for an increase in membership, denied membership to a designated group, and refused to act as their bargaining agent. Such a perversion of the normal tendencies and activities of a union and its members fixes malice and revenge as the motives actuating the scheme, and illumines the conspiracy and its objects.

It is now appropriate to enter upon a discussion of the *Apex* case, since the Court below and the District Court relied upon it.

**The Implications and Bearing of the Apex Case**

The *Apex* case is too recent and too well known to require an elaborate picture of the facts. In that case, this Court decided that members of a labor union engaged in a local sit-down strike had not violated the anti-trust laws by their activities, although those activities resulted in an incidental restraint upon interstate commerce.

The opinion in the *Apex* case discussed the common law heritage of the Sherman Act, analyzed former adjudications of this court under the Act, and used some seemingly qualifying expressions, from which those subsequently accused of violations of the law have endeavored to gather solace.

The petitioners have already indicated their contention that, viewed from one aspect, the case is sui generis in that its conclusion, its rationale, and its language are restricted to the case of a labor union engaged in a local strike in pursuit of legitimate labor objectives.

It may be noted in passing that the case at bar is not one of a strike, local or otherwise, nor one wherein any labor objective is involved at all.

The Court below stressed part of the following language from the *Apex* case, *supra:*

> "These cases show that activities of labor organizations not immunized by the Clayton Act are not necessarily violations of the Sherman Act. Underlying and implicit in all of them is recognition that the Sherman Act was not enacted to police interstate transportation, or to afford a remedy for wrongs, which are actionable under state law, and result from combinations and conspiracies which fall short, both in their pur-

> pose and effect, of any form of market control of a commodity, such as to 'monopolize the supply, control its price, or discriminate between its would-be purchasers'." (R. 54)

"These cases"—the cases referred to in the above excerpt—were all cases involving labor unions and labor disputes which the Court had discussed in that part of the opinion just preceding the above-quoted excerpt.

It is trite, but sometimes necessary, to reiterate that decisions and opinions must be read in the light of the facts. The failure of the Court below to recognize this rule of interpretation compels the platitude. The context surrounding the excerpt makes it patent that in using the language, this Court intended the language to apply only to cases of local strikes by labor unions pursuing legitimate labor objectives.

How, in the light of other statements in the *Apex* case, could this language be construed differently? At pages 484, 485, this Court said:

> "In point of the immediacy of the effect of the strikers' acts upon the interstate transportation involved *and of its volume*, the case does not differ from many others in which we have sustained the Congressional exercise of the commerce power * * * And in the application of the Sherman Act * * * it is the nature of the restraint and its effect on interstate commerce *and not* the amount of the commerce which are tests of violation.

Elsewhere in this brief, in the summary of the argument, the thought has been advanced that the rationale of the *Apex* case included a balancing between broad and sometimes conflicting questions of national policy—preservation of the rights of labor on the one hand, and interdiction of restraints upon commerce on the other hand. This thought

was not born merely of inference. This Court said at page 513 in the Apex opinion:

> "If, without such effects on the market we were to hold that a local factory strike, stopping production and shipment of its products interstate, violates the Sherman Law, practically every strike in modern industry would be brought within the jurisdiction of the federal courts under the Sherman Act to remedy local law violations. The Act was plainly not intended to reach such a result * * *"

This language plainly indicates the balancing process to which reference has been made, and reinforces the contention of the petitioners that the decision of the *Apex* case is restricted to a particular factual situation.

Were this not so, the *Apex* case would seem in conflict with other pronouncements of this court upon the same subject.

In *Central Ohio Salt Co.* v. *Guthrie*, 35 Ohio St. 666, 672 cited with approval in *Northern Securities Co.* v. *U. S.*, 193 U. S. 197, 340; 24 S. Ct. 436; 48 L. Ed. 679, the Court said:

> "* * * It is no answer to say that competition in the salt trade was not in fact destroyed or that the price of the commodity was not unreasonably advanced. Courts will not stop to enquire as to the degree of injury inflicted upon the public; it is enough to know that the inevitable tendency of such contracts is injurious to the public."

In *U. S.* v. *Socony Vacuum Oil Co., Inc.*, et al., 310 U. S. 150; 60 S. Ct. 811; 84 L. Ed. 1129, where the Steers case was cited with approval, the following was stated (p. 225, ft. 59):

> "* * * And the amount of interstate or foreign trade involved is not material (Montague & Co. v. Lowry, 193 U. S. 38) since Sec. 1 of the Act brands as

illegal the character of the restraint not the amount of commerce affected."

The Sixth Circuit said in *Patterson* v. *U. S.*, 222 F. 599 (cert. den. 238 U. S. 635; 35 S. Ct. 939; 59 L. Ed. 1499):

> "And it is immaterial what is the extent of the interstate trade or commerce conspired against. In the case of Steers *v.* United States, 192 F. 1, 112 CCA 423, it was held by this court that a conspiracy in restraint of a single interstate shipment was within the section. There is no act of interstate trade or commerce so insignificant as not to be protected by it. Clearly, then, a conspiracy between the officers and agents of one competitor on its behalf in restraint of a single interstate sale or shipment of another competitor is covered by it."

The seeming inconsistency between the language in the excerpts just quoted and the words "wide-spread" and "substantial effect upon commerce" used in the *Apex* case, is, of course, apparent only and not real. The *Apex* case is entirely reconcilable with the others, because the *Apex* case is marked off from them by a distinguishing factor—the fact-situation of a local strike with only an indirect, incidental or secondary effect upon interstate commerce. Indeed, the Socony-Vacuum Oil case was adverted to, but certainly not overruled, in Apex.

This Court said in the *Apex* case (p. 490):

> "In considering whether union activities like the present may fairly be deemed to be embraced within this phrase (restraint of trade or commerce) three circumstances relating to the history and application of the Act which are of striking significance, must first be taken into account."

The first was that the Sherman Act was not aimed at policing interstate transportation or movement of goods and property.

The second was that the Supreme Court had never applied the Sherman Act in any case, whether or not involving labor organizations or activities, unless that Court was of the opinion that there was some form of restraint upon commercial competition in the marketing of goods or services.

The third was that the Supreme Court had refused to apply the Sherman Act in cases like the Apex, in which "local strikes conducted by illegal means in a *production industry* prevented interstate shipments of substantial amounts of the product, but in which it was not shown that the restrictions on shipments had operated to restrain commercial competition in some substantial way" (p. 497).

To us, the language in the third of these "three significant circumstances" is a plain indication that the rationale and effect of the decision is confined to cases of "local strikes" in a "production industry" such as existed in the *Apex* case.

In the opinion of the District Court (R. 47), it was said that the respondents did not meet the principle enunciated in Apex, to the effect that "restraints on competition • • • is not enough, unless the restraint is shown • • • to deprive purchasers or consumers of the advantages which they derive from free competition."

The conclusion is a little difficult to understand. Those who used the truck hauling services of the petitioners were certainly deprived of the advantages which they would derive from the free competition of the petitioners. They were deprived of the advantage of that competition pro tanto. A. & P. used 25 hauling firms (including the petitioners), operating 48 trucks. After the respondents eliminated the petitioners by destroying their business, A. & P. had only 24 haulers (using 40 trucks) upon which to call. By how many haulers would the available supply have to be reduced before A. & P. would be held to have been de-

prived of the advantages of free competition? It must be evident that where the destruction of an instrumentality of interstate commerce is concerned, the violation does not depend upon differences in degree. There is less competition among 24 haulers than among 25.

The court below (R. 53, 54) took the *Apex* case to mean that, under any state of facts, the Sherman and Clayton Acts sought to prevent *only* those restraints upon free competition in business or commercial transactions which tend to restrict production, raise prices or otherwise control the market in goods or services to the detriment of the public.

But this court said in the case of *Fashion Originators Guild of America, et al.* v. *F. T. C., supra:*

> "Petitioners, however, argue that the combination cannot be contrary to the policy of the Sherman and Clayton Acts, since the Federal Trade Commission did not find that the combination fixed or regulated prices, parcelled out or limited production, or brought about a deterioration in quality. But action falling into these three categories *does not exhaust the types of conduct banned by the Sherman and Clayton Acts*" (p. 466).

We believe it fair to state that the Court below overlooked this interpretation of the acts in the case just cited, and consequently failed to realize that the language in the *Apex* case must be read in the light of the facts.

The case of *American Medical Assn.* v. *United States, supra* (decided subsequent to the *Apex* case), rested its affirmance of a conviction under the Sherman Act upon the proposition that the Act reserved to a trader the liberty to engage in any lawful calling in interstate commerce, and that a restraint thereof violated the Act. The Court below apparently ignored that principle.

We do not understand the *Apex* case to hold that an organization which happens to be a labor union may, out of pure malice, with impunity under the Anti-Trust Laws,

conspire to destroy an instrumentality of interstate commerce or a business engaged in that commerce, absent any labor dispute or objective.

This concludes the analysis of the *Apex* case. At the risk of wearisome repetition, we reiterate that the expressions therein and the rationale disclosed thereby are restricted to cases involving similar facts: that is, to cases of indirect, incidental and secondary restraints upon interstate commerce flowing from the activities of a union involved in a local strike in pursuit of legitimate labor objectives. The case at bar is entirely different. Here there was no labor dispute. Here, no strike was involved, local or otherwise. Here, no labor objective was pursued, legitimate or otherwise. Here, malice actuated the conspiracy. Here, the restraint upon commerce (the result of a planned conspiratorial destruction of an instrumentality) was direct and primary, in the characterizing words of the *Shipowners* case, *supra*.

## Theories Relied On for Defense

### *Acts Innocent in Themselves*

Respondents take the position that this is merely a case where a labor union for "good and sufficient reasons" refused to enter into contractual relations with the petitioners or to admit petitioners' employees into membership in the union. The "indirect effect" of which was to force plaintiffs out of business.

Conceding that it was the Hass killing which actuated the respondents to do whatever they did, respondents draw therefrom the inference that the union did not "intend to affect interstate commerce in any way."[7]

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[7] Respondents' Brief in opposition, p. 5.

The refusal to admit the petitioners' employees into the union was not the innocent isolated act which the defense makes it out to be. It was but one of a series of planned, deliberate, concerted steps in a savage conspiracy to destroy an instrumentality of commerce. Means lawful in themselves become unlawful when part of such a conspiracy. The late Mr. Justice Holmes said in *American Bank & Trust Co.* v. *Federal Reserve Bank, et al.*, 256 U. S. 350, 41 S. Ct. 499, 65 L. Ed. 983:

> "* * * But the word 'right' is one of the most deceptive of pitfalls; it is so easy to slip from a qualified meaning in the premise to an unqualified one in the conclusion. Most rights are qualified. A man has at least as absolute a right to give his own money as he has to demand money from a party that has made no promise to him; yet if he gives it to induce another to steal or murder the purpose of the act makes it a crime" (p. 358).

That was a case where a Federal Reserve Bank and its officers, in combination, planned to carry out a scheme to force small country banks to join the Federal Reserve System. The means intended to be used were these: the defendant bank planned to accumulate checks of each respective country bank until it had a large number, and then present them for payment at one time. This course of conduct was designed to force the small banks to keep so much cash on hand they would be forced out of business if the scheme went through.

The Supreme Court reversed the order of the Court below dismissing the bill. Justice Holmes said (pp. 358-9):

> "* * * Banks as we know them could not exist if they could not rely upon averages and lend a large part of the money that they receive from their depositors on the assumption that not more than a certain fraction of it will be demanded on any one day. If

without a word of falsehood but acting from what we have called disinterested malevolence a man by persuasion should organize and carry into effect a run upon a bank and ruin it, we cannot doubt that an action would lie. A similar result even if less complete in its effect is to be expected from the course that the defendants are alleged to intend, and to determine whether they are authorized to follow that course it is not enough to refer to the general right of a holder of checks to present them but it is necessary to consider whether the collection of checks and presenting them in a body for the purpose of breaking down the plaintiffs' business as now conducted is justified by the ulterior purpose in view."

In *Scavenger Service Corporation* v. *Courtney et al.*, 85 F. 2d 825 (C. C. A. 7) (936), it was said (p. 833):

"The conspiracy was one to ruin appellant's business. Therefore the means adopted were unlawful. The actionable character of the means may be and often is determined by the use to which they are put. If, therefore, individuals conspired to commit the wrongful act of ruining appellant's business, the means, even though of themselves innocent, were actionable."

Mr. Justice Holmes said in *Aikens* v. *Wisconsin*, 195 U. S. 194 (1904) at pp. 205-06:

"* * * But an act, which in itself is merely a voluntary muscular contraction, derives all its character from the consequences which will follow it under the circumstances in which it was done. When the acts consist of making a combination calculated to cause temporal damage, the power to punish such acts, when done maliciously, cannot be denied because they are to be followed and worked out by conduct which might have been lawful if not preceded by the acts. *No conduct has such an absolute privilege as to justify all possible schemes of which it may be a part. The*

*most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot neither its innocence nor the Constitution is sufficient to prevent the punishment of the plot by law."*

So much for the defense that refusal of admission into the union (i.e., one of the means adopted to further a conspiracy) was in itself an innocent act.

*Immunity of a Labor Union*

Defendants, of course, may not claim the immunity of the Clayton or Norris-LaGuardia Acts. They were not pursuing any labor objective in their conspiracy. No labor objective was involved. The labor organization was not acting in its self-interest. It was motivated by malice. Therefore, the following language from *Opera on Tour, Inc. v. Weber*, 285 N. Y. 348, 355-9, 136 A. L. R. 267 (cert. den. 62 S. Ct. 96, 62 S. Ct. 477):

"The SELF-INTEREST OF LABOR, like the self-interest of any other body, receives immunity only for those objectives which have a legitimate and reasonable relation to lawful benefits which the union is seeking. When the labor objectives are illegal, the courts must control, otherwise there are bodies within our midst which are free from the provisions of the Penal Law. * * * By way of illustration, the courts condemn the combined effort of employees to coerce an employer to pay a stale or disputed claim, even though it might be to the self-interest of the striking employees. Dorchy v. Kansas, 272 U. S. 306. * * *

"Thus the previous decisions of this court have recognized that there are unlawful labor objectives and that the courts must take cognizance of the difference between an unlawful objective and an objective which has some legitimate connection with terms or conditions of employment or concerning an interest of an employer or employee, even though the parties con-

cerned do not themselves stand in an employer-employee relationship."

This means, of course, that so far as the present controversy is concerned, the fact that one of the defendants is a labor union has no significance. So far as the Clayton or Norris-LaGuardia Acts are concerned, the respondent union might just as well be an Elks or Kiwanis Club. What they did was not done in their character as a union: that they happened to be a union is but a fortuitous circumstance, utterly wanting in legal significance.

A different approach to the same phase of the case is discussed in the Consolidated Terminal Case.[8]

This too was a labor union case, where the Court held that no labor objectives were involved. The court said (p. 649):

> "* * * This seems to me to be only a different way of saying that it is the difference between a restraint of trade that is not 'reasonable' and one that is; that is, the difference between a conspiracy that is malicious in that there is no just cause or excuse based upon legitimate interest, and one that is not malicious, because it is based upon just cause and excuse by reason of the legitimate interests of those concerned."

This court said in the Columbia River Packers Assn. case:[9]

> "We recognize that by the terms of the statute (Norris-LaGuardia Act) there may be a 'labor dispute' where the disputants do not stand in the proximate relation of employer and employee. *But the statutory classification, however broad, of parties and circumstances to which a 'labor dispute' may relate does not expand the application of the Act to include*

[8] Consolidated Terminal Corp. v. Drivers, Chauffeurs and Helpers Local Union 639, et al., 33 F. Supp. 645.

[9] 315 U. S. 143, 146, 62 S. Ct. 520.

*controversies upon which the employer-employee relationship has no bearing.* * * *"*

So much for the factor of malice and for any defense predicated upon the claimed immunity as a labor organization.

*The Aim of the Conspiracy*

To the defense that the intent of the respondents was directed towards destroying the petitioners' business and not at interstate commerce, there are several answers.

One is held to intend the natural and probable consequence of his acts.

The following language, originally a charge to a jury, was approved in *Williams v. U. S.*, 295 F. 302, 304 (cert. den. 265 U. S. 591):

> "If the necessary effect of the conspiracy when carried into effect is to directly restrain commerce among the several states, it is immaterial and unimportant whether the conspirators intended such conspiracy should have such effect or not, and it is immaterial and unimportant that such conspirators may have had other objects or purposes in view."

In *United States* v. *Patten*, 226 U. S. 525, 543, 33 S. Ct. 141, it was said:

> "* * * the conspirators must be held to have intended the necessary and direct consequences of their acts and cannot be heard to say the contrary. In other words, by purposely engaging in a conspiracy which necessarily and directly produces the result which the statute is designed to prevent, they are, in legal contemplation, chargeable with intending that result. * * *"

This language was recently quoted with approval by this Court in *U. S.* v. *The Masonite Corp., et al.*, 316 U. S. 265, 62 S. Ct. 1070 (1942).

If the conspirators seek to justify their acts by the Hass killing, the answer is furnished by Style Piracy Case,[10] wherein this court rejected the defense that the acts complained of were justified by the plaintiffs' tort. This court said (p. 468):

> "* * * even if copying were an acknowledged tort under the law of every state, that situation would not justify petitioners in combining together to regulate and restrain interstate commerce in violation of federal law. * * *

Neither private individuals nor labor organizations may take into their own hands the punishment of alleged crimes. If, in doing so they violate the Sherman Act, the alleged crime is no justification, and will not immunize them from the consequences of the violation.

> "In addition to all this, the combination is in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce, and provides extra-judicial tribunals for determination and punishment of violations, and thus 'trenches upon the power of the national legislature and violates the statute.'" Style Piracy case, *supra* (p. 465).

**The Fact Finding as to Restraint**

It is necessary to challenge a fact finding made by the District Court.

Finding No. 18 (R. 44) reads as follows:

"18. The elimination of the plaintiffs' services did not in any manner affect the interstate operations of A & P or the Sterling Supply Company."

There is nothing in the record to support the statement. Indeed, the evidence is quite otherwise. The following is

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[10] 312 U.S. 457, 61 S. Ct. 703.

from the cross examination of MacIver of the A & P (R. 30-31):

> "Q Did the fact you sent them that notice interfere with your ability to handle your goods in interstate commerce?
>
> * * * * * * *
>
> "The Witness: Affect it, yes, because there were seven trucks that had to be replaced. To that extent it affected us."

The Court below said in its opinion:

> "* * * We must assume, for nothing to the contrary appears in the plaintiffs' case, that the number of haulers available to haul produce and foodstuffs was not diminished but simply that some other hauling concern took over the work formerly performed by the plaintiffs and that there was no increase in the cost of hauling traceable to the acts of the defendants in eliminating the plaintiffs from the field. * * *"

There is an inherent fallacy in thought in the above language. How could the number of haulers *not* have been diminished? The number of haulers was diminished by one—by the elimination of the petitioners. That elimination lessened the number of competitors in the field, and *pro tanto* deprived the public of the benefits of competition which would flow from a greater number of competitors. Of course other haulers took up the work. It was the *hauling* that possibly was not lessened — *not the competition.* A monopoly would assert a poor defense were it to seek to justify itself by the assertion that the public was not deprived of goods or services because a monopoly was created. The point is that the public is deprived of the benefits of *competition:* so here.

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## Concluding Summary

Petitioners operated an instrumentality of interstate commerce.

Respondents engaged in a conspiracy to ruin and destroy that business utterly.

The conspiracy was actuated by malice. Therefore it was unlawful.

Since no labor dispute was involved, no strike existed, and no labor objective was sought, the instant case is not ruled by the *Apex* or *Hutcheson*[11] cases.

Since it aimed at and accomplished the destruction of an instrumentality, it exercised a direct and primary restraint upon interstate commerce.

Since it aimed at and accomplished the destruction of an interstate commerce business it exercised a direct and primary restraint upon interstate commerce.

The destruction of the petitioners' business is *pro tanto* a destruction of interstate commerce itself, and one of the very evils which the enactment of the Anti-Trust Laws was designed to prevent.

It is no defense for the respondents to say that they did not intend to affect interstate commerce. The natural and inevitable effect of the acts contemplated by the conspiracy was such a restraint; and they therefore cannot be heard to say to the contrary.

The fact that respondents were members of a labor union confers no immunity. What they did had no relation to their labor organization or its legitimate purpose; nor were their acts in the self-interest of a labor union.

Petitioners urge that:

(a) The plotted conspiratorial destruction of a business in interstate commerce (*a fortiori* such destruction of an

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[11] *U. S. v. Hutcheson*, 312 U. S. 219, 61 S. Ct. 463.

instrumentality) is, as a necessary corollary, a restraint upon interstate commerce within the Sherman Act, and constitutes a violation of that Act; and the owner of the business or instrumentality thus destroyed is entitled to the damages and injunctive relief (here sought) provided by the Sherman and Clayton Acts.

(b) The court below erred in affirming the judgment of the District Court dismissing the complaint.

(c) The judgment of the court below should be reversed and the case remanded for further proceedings looking to the ascertainment and award of damages and injunctive relief.

Respectfully submitted,

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